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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANDERS S. BILLING AND DIANN E. BILLING,
Petitioners,

v.

RAVIN, GREENBERG & ZACKIN, P.A.;
RAVIN, GREENBERG & MARKS, P.A.;
AND HOWARD GREENBERG,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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108 pp

QUESTION PRESENTED

Whether, by filing a bankruptcy petition, a debtor waives his right to a jury trial guarantied by the Seventh Amendment to the United States Constitution.

LIST OF PARTIES

Petitioners, Anders S. Billing and Diann E. Billing, were the plaintiffs-appellees in the proceedings below. Respondents, Ravin, Greenberg & Zackin, P.A., Ravin, Greenberg & Marks, P.A. and Howard Greenberg, were the defendants-appellants in the proceedings below.

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RAVIN, GREENBERG & ZACKIN, P.A.; RAVIN, GREENBERG & MARKS, P.A.; AND HOWARD GREENBERG,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Anders S. Billing and Diann E. Billing, respectfully pray that a writ of *certiorari* issue to review the Opinion and Order of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on April 20, 1994, which held that the Petitioners, debtors in bankruptcy, have no Seventh Amendment right to a trial by jury on their complaint for legal malpractice against the Respondents.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is not yet reported, and is reprinted in the Appendix hereto at page A-1, *infra*. The Order of the United States Court of Appeals for the Third Circuit denying Petitioners' Petition for Rehearing With a Suggestion for Rehearing *In Banc*, dated May 23, 1994, is reprinted in the Appendix hereto at page B-1, *infra*.

The Order and Opinion of the United States District Court for the District of New Jersey are reported at 150 B.R. 563 (D.N.J. 1993), and are reprinted in the Appendix hereto at pages C-1 and D-1, *infra*, respectively. The Order of the United States District Court for the District of New Jersey denying Respondents' motion for reconsideration is reprinted in the Appendix hereto at page E-1, *infra*.

JURISDICTION

Petitioners brought this suit in the District Court, invoking jurisdiction under 28 U.S.C. §1334. On January 22, 1993 the District Court entered an Order and Opinion denying Respondents' motion to dismiss the Petitioners' complaint for lack of jurisdiction, or, alternatively, for referral to the Bankruptcy Court or for a stay. On March 25, 1993 the District Court granted the Respondents' motion for leave to appeal pursuant to 28 U.S.C. §1292(b).

On May 12, 1993 the United States Court of Appeals for the Third Circuit granted the Respondents' petition for leave to appeal pursuant to 28 U.S.C. §1292(b). On April 20, 1994 the Third Circuit entered an Opinion and Order reversing the decision of the District Court, finding that the District Court did not have jurisdiction over the Petitioners' lawsuit, and remanding the Petitioners' lawsuit to the District Court for referral to the Bankruptcy Court. The Petitioners filed a timely Petition for Rehearing With a Suggestion for Rehearing *In Banc* on May 2, 1994. The Third Circuit denied the Petition for Rehearing With a Suggestion for Rehearing *In Banc*, by a vote of seven to six, on May 23, 1994.

Petitioners invoke the jurisdiction of this Court to review the Opinion and Order of the Third Circuit pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Seventh Amendment to the United States Constitution is reprinted in the Appendix hereto at page F-1, *infra*.

STATEMENT OF THE CASE

The Petitioners' Complaint

On October 16, 1992 the Petitioners, debtors in bankruptcy, commenced an action in the United States

District Court for the District of New Jersey against the Respondents -- a law firm, its successor law firm and an individual lawyer of that firm -- who had represented the Petitioners during the course of the bankruptcy proceeding. The Petitioners alleged causes of action for malpractice, misrepresentation, breach of fiduciary duty and breach of contract, and demanded a trial by jury. (*See* p. D4, *infra*). The Petitioners' complaint arose entirely out of the Respondents' post-petition conduct.

On the same day they filed the complaint, the Petitioners filed in the Bankruptcy Court an objection to the Respondents' petition for an award of attorney's fees on the ground, in part, that the Respondents had failed to render competent legal services.

The Respondents' Motion to Dismiss

On November 18, 1992 the Respondents moved in the District Court to dismiss the complaint for lack of jurisdiction, or for a referral to the Bankruptcy Court, or to have the action stayed pending a decision by the Bankruptcy Court on the Respondents' fee application. (*See* pp. D4-D5, *infra*). Simultaneously, on November 19, 1992 the Respondents moved in the Bankruptcy Court for a determination of whether the Petitioners' malpractice complaint was a core proceeding.

On January 22, 1993 the District Court denied the Respondents' motion in its entirety, holding that: (1) the complaint was a core proceeding; (2) the Petitioners were entitled to a jury trial; (3) the Bankruptcy Court could not conduct a jury trial; and (4) the Respondents' fee application could not be determined until the case before

the District Court was fully litigated. (*See* pp. D19-D20, *infra*).

On March 25, 1993 the District Court granted the Respondents' motion pursuant to 28 U.S.C. §1292(b) to certify the following issues for appeal: (1) whether the Petitioners' action for malpractice constituted a core proceeding; (2) whether a Bankruptcy Court is empowered to conduct a jury trial in a core proceeding; and (3) whether the Petitioners "waived" their right to a jury trial by submitting to the equitable jurisdiction of the Bankruptcy Court. (*See* p. A5, *infra*). On May 12, 1993 the Third Circuit granted the Respondents' petition for leave to appeal, and on April 20, 1994 the Third Circuit handed down its decision reversing the District Court in a two-to-one decision.

The Third Circuit Decision

In the majority opinion, the Third Circuit did not reach the issue of whether the Petitioners' malpractice action constituted a core proceeding, or the issue of whether a bankruptcy court can conduct a jury trial. Rather, over the strong dissent of Chief Judge Sloviter, the majority reversed the District Court's decision on the ground that the Petitioners' complaint was nothing more than "a defense" to the Respondents' bankruptcy court fee application and that the Petitioners were not entitled to a jury trial on their malpractice claim. (*See* pp. A6-A8, *infra*). The majority wrote:

> We hold that an allegation of legal malpractice raised as a defense to post-petition fees for bankruptcy counsel likewise

> falls within the process of the allowance and disallowance of claims. The debtors have no Seventh Amendment right to trial by jury, not because of specific waiver of Seventh Amendment rights, but because their claim has been converted from a legal one into an equitable dispute over a share of the estate.

(*See* pp. A31-A32, *infra*).

The Petitioners sought a rehearing *in banc* because the majority's decision creates a previously unrecognized exception to the Seventh Amendment right to jury trial which is inconsistent with the United States Constitution and prior decisional law of this Court. The Third Circuit denied the Petitioners' petition for rehearing *in banc* by a vote of seven to six. (*See* pp. B1-B2, *infra*).

REASONS FOR GRANTING THE WRIT

I.

The Third Circuit's decision violates the Seventh Amendment to the United States Constitution and is inconsistent with the decisions of this Court enforcing the Seventh Amendment in the context of claims asserted by or against a debtor or trustee in bankruptcy.

A.

The Petitioners' claim is a legal claim on which the Petitioners have a right to a trial by jury.

The Seventh Amendment to the United States Constitution provides the basis for the Petitioners' right to a jury trial. It states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

To determine whether a party is entitled to a jury trial, this Court has developed an historical analysis which rests on whether the party would be entitled to a jury trial at common law in late eighteenth century England. *See, e.g., Tull v. United States*, 481 U.S. 412 (1987). In *Tull*, this Court wrote:

> Prior to the Amendment's adoption, a jury trial was customary in suits brought in the English *law* courts. In contrast, those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial.

481 U.S. at 418 (citations omitted)(emphasis in original). *See also, Beard v. Braunstein*, 914 F.2d 434 (3rd Cir. 1990) (suits at common law afford the right to trial by jury).

In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), this Court set out a three-step analysis for determining whether a right to jury trial attaches to a particular claim. The Court wrote:

> First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. The second stage of this analysis is more important than the first. If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must

> decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder.

492 U.S. at 42 (citations omitted). *See also*, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 n.25 (1982) ("matters from their nature subject to 'a suit at common law ...'" lie at the "protected core" of Article III judicial power).

Here, the Petitioners' complaint alleges malpractice and breach of contract by the Respondents and seeks money damages. The Third Circuit majority conceded that the Petitioners' malpractice claim met the first two prongs of the *Granfinanciera* test. That is, the Petitioners' complaint asserts legal claims for which the Petitioners would be entitled to a jury trial at English common law.[1/] The third prong of that test similarly does not operate to deprive the Petitioners of their right to a jury trial.

1/ It is well-settled that parties to such state-law malpractice claims are entitled to a jury trial. *See, e.g., In re SPI Communications & Marketing, Inc.*, 112 B.R. 507, 512 (B.N.D.N.Y. 1990) (jury trial in debtors' malpractice action against their bankruptcy counsel).

B.

The Petitioners' malpractice claim does not involve public rights.

In *Granfinanciera*, this Court determined that Congress may assign disputes involving "public rights" to a tribunal that does not use a jury as a factfinder without violating the Seventh Amendment. *Granfinanciera*, 492 U.S. at 51. That infringement of the right to jury trial, however, is strictly limited. In *Granfinanciera* this Court wrote:

> Congress may only deny trials by jury in actions at law, we said in cases where "public rights" are litigated: "Our prior cases support administrative fact finding in only those situations involving 'public rights', e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. *Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.*

492 U.S. at 51 (emphasis added).

The Court made clear that traditional state-law causes of action, such as the Petitioners' claims here, are not transformed into claims related to "public rights" merely because they are asserted by a bankruptcy debtor or trustee. The Court wrote:

> [S]tate-law causes of action for breach of contract or warranty are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings. ... There can be little doubt that fraudulent conveyance actions by bankruptcy trustees ... [which] "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it" -- are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. They therefore appear matters of private rather than public right.

492 U.S. at 56 (citations omitted).

Thus, it is clear that the right of a debtor, such as the Petitioners here, to recover contract or tort damages to augment the assets of the estate is private. *See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71-72 (1982). The Third Circuit recognized that the "public right" exception was inapplicable to the Petitioners' traditional state-law claim, and in fact conceded that "[a] debtor's action to recover damages for legal malpractice, arising from an attorney's tortious negligence, is likewise a private rather than a public right, and thus ordinarily would implicate a right to jury trial." (*See* pp. A10-A11, *infra*). As observed by Judge Sloviter in her dissenting opinion, that concession

should have been determinative under *Granfinanciera*, and it should have led the Third Circuit to affirm the District Court's decision. (*See* p. A37, *infra*). Instead, the majority created another, previously unrecognized "exception" to the Seventh Amendment right to jury trial. The majority wrote:

> The third prong of the *Granfinanciera* test *suggests* a limitation on the Seventh Amendment right to trial by jury in addition to the public rights doctrine. This restriction, less well articulated, has emerged in connection with creditors' demands for a jury trial in actions brought by the trustee in bankruptcy.

(*See* p. A12, *infra*) (emphasis added).

The Third Circuit's additional exception to the right to jury trial is not only unsupported by any prior decision of this Court, it is directly *contrary* to this Court's clear pronouncements guaranteeing the right to jury trial.

C.

There is no authority for the Third Circuit's exception to the right to jury trial.

The Third Circuit held that the Petitioners' legal claim for malpractice was "converted" into an equitable claim simply because the Respondents had filed a petition for counsel fees with the bankruptcy court, and the Petitioners had objected to that petition. The Third Circuit

relied on *Langenkamp v. Culp*, 498 U.S. 42 (1990), in which this Court held that a creditor who files a proof of claim against the estate is not entitled to a jury trial on matters affecting the allowance of that claim. The Court there held that by filing a proof of claim the creditor triggers the process of "allowance and disallowance" of claims, and thus submits itself to the bankruptcy court's equitable jurisdiction. 498 U.S. at 44.

The Third Circuit analogized this case to *Langenkamp*, finding the Petitioners' action for malpractice similar to a preference action against a creditor who had filed a proof of claim. The majority wrote:

> In the case before us, the debtors' objections to attorney's fees rested heavily on their claims of malpractice. The district court recognized the interrelated nature of the actions, finding that "the merits of the malpractice claims must be resolved before there can be a resolution of the fee dispute." ... The close connection between the malpractice action and the objections to fees leads us to conclude that the debtors' allegations of malpractice are part of the process of allowance and disallowance of claims.

(*See* p. A29, *infra*).

The Third Circuit's reasoning fails for two reasons. First, and foremost, there is simply no authority for creating this additional exception to the right to a jury trial guaranteed by the Seventh Amendment. In fact, the Third

Circuit's opinion is directly contrary to this Court's pronouncement in *Granfinanciera* that "[u]nless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial." 492 U.S. at 53. The majority conceded that the Petitioners' malpractice claim involves private, not public, rights.

Second, if the Third Circuit were correct, then all claims asserted by debtors and trustees would have to be heard in bankruptcy court without a jury because the act of filing a bankruptcy petition would be deemed to have triggered a waiver of the right to trial by jury on all claims. *Granfinanciera* held precisely the opposite with respect to a trustee's fraudulent conveyance action. The majority's reliance on *Langenkamp* and similar cases relating to claims against a creditor who has filed a proof of claim is misplaced. In those cases the party who sought the jury trial was the creditor who filed the claim, not the trustee who filed the action. Thus, those cases do not stand for the proposition that the debtor or trustee can be deprived of the right to a jury trial on an admittedly private claim merely because the defendant to that claim has filed a claim against the estate.

Moreover, the Respondents here were not pre-petition creditors, nor had they filed a proof of claim against the estate. Rather, they sought payment of counsel fees as an administrative expense in an amount vastly smaller than the damages sought by the Petitioners in the District Court action. The Third Circuit cited no case applying the *Langenkamp* rationale to such an administrative claim.

The Third Circuit's decision is contrary to this Court's explicit statements limiting the circumstances under which parties may be deprived of their Seventh Amendment right to a jury trial. While the Third Circuit purported to reject the argument that bankruptcy debtors waive their Seventh Amendment rights by filing a bankruptcy petition, that is the practical and inevitable result of the Third Circuit's decision. Such an important constitutional issue should only be decided by this Court.

II.

The Third Circuit's decision is in conflict with *Germain v. Connecticut National Bank*, in which the Second Circuit held that a bankruptcy trustee was entitled to a jury trial on his post-petition tort and contract claims against a creditor which had filed a proof of claim.

As discussed above, the Third Circuit's decision is contrary to this Court's decisions concerning the Seventh Amendment right to jury trial in a bankruptcy context. The Third Circuit's decision is also in conflict with the law in the Second Circuit, as set forth in *Germain v. Connecticut National Bank*, 988 F.2d 1323 (2d Cir. 1993).

In *Germain*, the debtor filed a voluntary petition for protection under Chapter 11 of the Bankruptcy Code. Thereafter, Connecticut National Bank ("CNB") filed a proof of claim against the bankruptcy estate for pre-petition debts. The bankruptcy trustee subsequently filed a state-court complaint against CNB for tortious interference with the debtor's business, duress, breach of the duty of good

faith and misrepresentation. The complaint was based on CNB's post-petition conduct in its capacity as the debtor's primary lender. CNB had the action removed to the bankruptcy court. The trustee demanded a trial by jury, and therefore moved to have the action withdrawn from the bankruptcy court to the district court.

The district court adopted the bankruptcy court's recommendation that the action was a core proceeding, but that the trustee was entitled to a jury trial. The Second Circuit agreed. The court reviewed this Court's decisions applying the Seventh Amendment in a bankruptcy context, and determined that under those decisions a creditor who, by filing a proof of claim, submits to the equity jurisdiction of the bankruptcy court "thereby waives any right to a jury trial for the resolution of disputes vital to the bankruptcy process, such as those involving the determination of who is a valid creditor and which creditors are senior in the creditor hierarchy." 988 F.2d at 1329-1330.

The court held, however, that neither such a creditor *nor a debtor or trustee* surrenders the constitutional right to a jury trial for the resolution of disputes that are only *incidentally* related to the bankruptcy process. In order for the right to jury trial to be lost, the dispute must be part of the claims-allowance process or affect the hierarchical reordering of creditors' claims. 988 F.2d at 1330. The court wrote:

> We do not believe that the Trustee's action here bears a close nexus to any statutory public right. Indeed, his state law causes of action "are paradigmatic private rights, even when asserted by an insolvent corporation in

> the midst of Chapter 11 reorganization proceedings." [citing *Granfinanciera*] His suit is aimed at enhancing the bankruptcy estate and does not involve any other creditor's rights or the relationship among the creditors as a group or between the debtor and another creditor. The suit seeks compensation for damage done. It has nothing to do with the essence of the bankruptcy regulatory scheme of allowing or reordering claims.

988 F.2d at 1331.

Thus, the Second Circuit held that the trustee was entitled to a jury trial on his post-petition state law claims against CNB. The Third Circuit's decision in this case -- that the Petitioners were deprived of their Seventh Amendment rights by the Respondents' filing of a petition for attorney's fees -- is in direct conflict with the decision in *Germain*. Neither the Respondents' petition for fees nor the Petitioners' complaint have anything "to do with the essence of the bankruptcy regulatory scheme of allowing or reordering claims." *Germain*, 988 F.2d at 1331. As Chief Judge Sloviter observed, the Third Circuit decision here cannot be reconciled with the Second Circuit's decision in *Germain*. (*See* p. A47, *infra*). This Court should grant the writ of *certiorari* in this case in order to resolve the foregoing conflict.

III.

The Courts of Appeals are in disagreement over the proper interpretation of this Court's decisions in *Granfinanciera* and *Langenkamp*, and the resulting confusion has significantly eroded Seventh Amendment rights in the context of bankruptcy proceedings.

This Court last addressed Seventh Amendment rights in the bankruptcy context in *Langenkamp* in 1990. Since that decision five Courts of Appeals have confronted the issue, and have reached widely disparate conclusions. Moreover, in some of those decisions the courts have gone well beyond this Court's precedent, and have virtually eliminated the right to jury trial of any party involved in a bankruptcy proceeding.

In *Matter of Hallahan*, 936 F.2d 1496 (7th Cir. 1991), the Seventh Circuit held that a debtor waives his right to jury trial by filing a bankruptcy petition. In *Hallahan*, a creditor filed a proof of claim against the estate, and filed an adversary proceeding for a determination of non-dischargeability. The bankruptcy court and the district court held that the debtor did not have a right to a jury trial on the non-dischargeability claim. The Seventh Circuit affirmed. The court first held that a non-dischargeability proceeding is an equitable action, for which there is no jury trial right. Rather than relying on that traditional ground, however, the court further held that the debtor had waived his right to a jury trial. The court wrote:

> Even if we were to assume that the dischargeability action was legal in nature, ... Hallahan cannot claim a right to jury trial because, as a Chapter 7 debtor, he voluntarily submitted his case to bankruptcy court. The Supreme Court did not address the extent of the debtor's Seventh Amendment right to jury trial in bankruptcy court in *Granfinanciera*. However, if creditors, "by presenting their claims ... subject[] themselves to all the consequences that attach to an appearance," ... thereby losing any jury trial right otherwise guaranteed by the Seventh Amendment, debtors who initially choose to invoke the bankruptcy court's jurisdiction to seek protection from their creditors cannot be endowed with any stronger rights.

936 F.2d at 1505.

Similarly, in *In re McLaren*, 3 F.3d 958 (6th Cir. 1993), a creditor filed an adversary proceeding for a determination of non-dischargeability. The Sixth Circuit, citing *Hallahan*, held that the debtor had waived his right to a jury trial by filing the bankruptcy petition. Significantly, the court did not even mention the fact that a non-dischargeability action is an equitable proceeding, but relied *solely* on the waiver theory. 3 F.3d at 960-961.

In *In re Jensen*, 946 F.2d 369 (5th Cir. 1991), the Fifth Circuit held that the debtor was entitled to a jury trial on his pre-petition state law claims against a non-creditor. The court refused to adopt the waiver argument accepted in

Hallahan, but found, in *dicta*, that the result would be different if the defendant in the state law action was a creditor. The court wrote:

> As we see it, the debtor was not entitled to a jury trial in *Hallahan*, not because the debtor had filed a petition in bankruptcy, but because the plaintiff had submitted his claim against the debtor to the equitable jurisdiction of the bankruptcy court. Filing a proof of claim denied both the plaintiff and the defendant, debtor, any right to jury trial that they otherwise might have had on that claim.

946 F.2d at 374.

Thus, the Fifth Circuit -- like the Third Circuit -- purported to reject the waiver theory, but adopted an alternative which inevitably leads to the same result. Both courts found that a creditor can deprive the debtor of a jury trial by filing a proof of claim. The only action of the debtor necessary to confer that power upon the creditor is the filing of the bankruptcy petition.

The Courts of Appeals are in complete confusion concerning the parameters of the Seventh Amendment right to jury trial in the bankruptcy context. Their decisions on the issue since *Langenkamp* not only are inconsistent with each other, but in some cases substantially ignore principles propounded by this Court. *Certiorari* was not requested in any of those cases. This Court should grant a writ of *certiorari* in this case in order to resolve the confusion among the Courts of Appeals.

CONCLUSION

The Petitioners have been deprived of a significant constitutional right. As Chief Judge Sloviter recognized in her dissenting opinion in this case, "[w]henever confronted with a Seventh Amendment right to ... jury trial issue, [the court] should be mindful that it is an important constitutional right that should not be taken away lightly:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

(*See* p. A49, *infra*, *quoting Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990)).

The majority failed to give proper deference to the Petitioners' right to jury trial and disregarded explicit decisions of this Court confirming that right. In order to correct the erroneous deprivation of the Petitioners' constitutional rights, and to ensure uniform adherence among the Courts of Appeals to this Court's decisions,

Petitioners respectfully request that their petition for a writ of *certiorari* be granted.

Respectfully submitted,

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